Salt River Valley Water Users' Association *and* Tom Herf. Case 28-CA-5785

July 16, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND JENKINS

On February 17, 1981, Administrative Law Judge Jay R. Pollack issued the attached Decision in this proceeding. Thereafter, Respondent Salt River Valley Water Users' Association filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed briefs in response to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified below, and to adopt his recommended Order, as modified herein.[2]

The Administrative Law Judge found that Respondent unlawfully denied employee Herf's request for a union representative while questioning him as to his absences; that Herf refused to answer any questions, informing Respondent's officials that the "interview" was unlawful; and that Respondent discharged Herf because of his failure to answer any questions. It is therefore clear that Herf was disciplined for refusing to participate in an "interview" conducted in derogation of his Section 7 right to a representative and that this refusal was itself protected by Section 7. *International Ladies' Garment Workers' Union, AFL-CIO* v. *Quality Manufacturing Co.*, 420 U.S. 276 (1975). Since Herf was discharged for engaging in protected concerted activities, a make-whole remedy is appropriate.[3] Further, given the Administrative Law Judge's findings, there is no need to separate Respondent's unlawful conduct into distinct violations of Section 8(a)(1).

AMENDED CONCLUSIONS OF LAW

We hereby affirm the Administrative Law Judge's Conclusions of Law, as modified below:

Substitute the following for Conclusion of Law 3:

"3. Respondent has engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act by discharging employee Tom Herf for refusing to participate in an interview conducted in derogation of his Section 7 right to a representative at said interview."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Salt River Valley Water Users' Association, Phoenix, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(a):

"(a) Discharging any employee for refusing to participate in an interview in derogation of the employee's Section 7 right to a representative at said interview."

2. Delete paragraph 1(b) and reletter paragraph 1(c) as 1(b).

3. Substitute the attached notice for that of the Administrative Law Judge.

MEMBER JENKINS, concurring:

I agree with my colleagues that employee Tom Herf was unlawfully discharged and that he should be reinstated and awarded backpay, but I cannot adopt my colleagues' supporting rationale. I do not agree with the majority's conclusion that the first interview between Herf and Respondent on March 20, 1980, was not violative of Herf's *Weingarten* rights and that a make-whole remedy under *Kraft Foods* is inappropriate.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In his Decision, the Administrative Law Judge hypothesizes that, if Herf, in the second meeting, had followed his union steward's advice and answered Respondent's questions, and if Respondent's supervisors had complied with Respondent's labor relations manager's advice and questioned Herf in the presence of a union representative prior to the discharge, then the unlawful character of the first interview might have been cured. However, since Herf was, in fact, discharged at the start of the second meeting, we find it unnecessary to adopt the Administrative Law Judge's hypothesis or pass on its validity in affirming the Administrative Law Judge's Decision.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[3] The Administrative Law Judge's discussion of *Kraft Foods, Inc.*, 251 NLRB 598 (1980), in regard to the appropriate remedy is misplaced. Unlike this case, where the discipline was imposed for Herf's exercise of his Sec. 7 rights, *Kraft Foods* involves the appropriateness of a make-whole remedy where, following a *Weingarten*-violative interview, an employee was disciplined for the underlying conduct which was the subject of the unlawful interview. *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975). Here, Herf was not discharged for unexcused absences and Respondent did not prove that Herf would have been so discharged in the absence of his refusal to answer Respondent's questions.

The majority concludes that the interview between Respondent and Herf was not an "interview" within the meaning of *Weingarten* because, following Respondent's denial of Herf's request for union representation, Herf stated "no comment" in response to Respondent's questions and stated that the interview was unlawful. The majority, citing *Quality Manufacturing*, concludes that Herf's conduct at the interview did not constitute "participation" in the interview and, therefore, *Weingarten* does not come into play.

The majority's misplaced reliance on *Quality Manufacturing* distorts the facts of this case and weakens employees' rights under *Weingarten*. In *Quality Manufacturing* an employee was discharged for refusing to attend an interview with the company president without union representation. That is hardly the case here. The record clearly shows that an interview took place in Respondent's office at 3 p.m. on the afternoon of March 20. Immediately before the start of the interview, Herf requested and was denied union representation. Thereafter, he attended the meeting with several management officials, stated that he thought the meeting was unlawful, and, for 20 minutes, answered a series of questions by stating "no comment." By holding that this meeting was a non-interview, the majority inexplicably reads *Weingarten* to require an employee to participate in some affirmative manner in the interview before his *Weingarten* rights arise. This places a new and unfounded burden on the employee by making the right to union representation conditional not on whether the employee reasonably believes that disciplinary action may result, but on whether the employee meaningfully participates in the interview. This is a requirement which was clearly not contemplated by the U.S. Supreme Court when it stated: "Requiring a lone employee to *attend* an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided to 'redress the perceived imbalance of economic power between labor and management.' *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 316 (1965)." *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. at 262. (Emphasis supplied.)

Contrary to the majority's interpretation, *Weingarten* provides simply that an employer violates Section 8(a)(1) by denying an employee's request that a union representative be present at an interview which the employee reasonably believes might result in disciplinary action. To hold that no interview occurs and therefore no *Weingarten* right arises until after an employee responds to questions in some meaningful way misreads *Weingarten* and needlessly dilutes employees' rights. The record in this case leaves little doubt that Herf had reasonable grounds to believe that the meeting might result in disciplinary action. As found by the Administrative Law Judge, on March 20 Herf's supervisor asked him to report to Respondent's office rather than his work station and Herf's steward related to him that Respondent wanted to discuss Herf's absences from work on March 13 and 14. It is clear, therefore, that Respondent violated Herf's rights under *Weingarten* by denying his request for a union representative at the first meeting on March 20.

Furthermore, I cannot agree with the majority's conclusion that a *Kraft Foods* make-whole remedy is inappropriate. The majority's conclusion that Herf was not discharged for the conduct which was the subject of the interview ignores the facts and the Administrative Law Judge's findings. The Administrative Law Judge found that Herf was discharged, *at least in part*, for his refusal to answer questions at the interview. In light of this finding, it is reasonable to infer that if Herf's conduct at the interview was only a partial motivation for the decision to discharge, the underlying reason for conducting the interview (i.e., Herf's absences from work) must have played a part in the discharge decision. Therefore, a make-whole remedy under *Kraft Foods* is required.[4]

My colleagues seem loath to explain their rationale for refusing to find that discharging an employee based on conduct or information obtained at an unlawful interview is violative of Section 8(a)(1).[5] Just as the threat to discharge an employee for engaging in protected concerted activity and the resulting discharge for engaging in such activity constitute separate violations of the Act, so does an Employer's unlawful denial of union representation and the subsequent discharge based on conduct engaged in or information obtained at the unlawful interview.

I would adopt the Administrative Law Judge's findings and conclusions in their entirety.

[4] See my partial dissent in *Kraft Foods*, 251 NLRB 598, 599, for a discussion of my position as to the appropriateness of a make-whole remedy when an employee is discharged for conduct which was the subject of an unlawful interview.

[5] See my concurring opinion in *Kahn's and Company, Division of Consolidated Foods, Co.*, 256 NLRB 930 (1981).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discharge any employee for refusing to participate in an interview conducted in derogation of the employee's right to a representative at the interview.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer Tom Herf immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and WE WILL make him whole for any loss of earnings he may have suffered by reason of our discrimination against him, plus interest.

WE WILL expunge and physically remove from our records any termination notices and any reference thereto relating to the discharge of Herf on March 20, 1980.

SALT RIVER VALLEY WATER USERS' ASSOCIATION

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge: This matter was heard before me at Phoenix, Arizona, on November 25 and 26, 1980.[1] Pursuant to a charge filed against Salt River Valley Water Users' Association (Respondent) by Tom Herf, an individual, on March 31, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint against Respondent on May 12, alleging that Respondent committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.* (herein called the Act). The complaint alleges in substance that Respondent denied the request of Herf, one of its employees, for union representation during an investigatory interview which Herf reasonably believed might, and which did, result in disciplinary action.

The parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Post-trial briefs were filed on behalf of the General Counsel, the Charging Party, and Respondent. Based upon the entire record,[2] upon the briefs filed by counsel, and upon my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

At all times material herein, Respondent has been an Arizona corporation engaged in the operation and maintenance of a water irrigation system in the Salt River Valley encompassing Phoenix, Arizona.[3] During the 12-month period preceding issuance of the complaint, Respondent purchased and received goods, materials, and supplies valued in excess of $50,000 directly from suppliers located outside the State of Arizona.

The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that at all times material herein the International Brotherhood of Electrical Workers, Local Union No. 266, AFL-CIO (the Union), has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

As discussed above, Respondent is engaged in the operation of a water irrigation system. Respondent's production and maintenance employees are represented by the Union and are covered by an existing collective-bargaining agreement.

[1] Unless otherwise stated, all dates refer to calendar year 1980.

[2] On January 14, 1981, counsel for the General Counsel made a motion to correct the record. As the motion was unopposed, the corrections contained therein are hereby granted, *sua sponte*, into the record as ALJ Exh. 1.

[3] The Salt River Project Agricultural Improvement and Power District (the District), a separate entity not involved in this proceeding, has certain coextensive administration and policies with Respondent. The two entities are collectively referred to in the record as the Salt River Project.

Tom Herf, the Charging Party herein, was employed by Respondent from January 25, 1978, to March 20, 1980, as a zanjero.[4] As a zanjero, Herf was scheduled to work 10 consecutive days, followed by 4 days off, on 8-hour rotating shifts. Herf had been scheduled to work the graveyard shift[5] from March 5 through 15. Herf did not report to work for the graveyard shifts commencing on March 13 and 14. Certain circumstances surrounding these absences from work caused Herf's supervisor, David Stanley, to become suspicious.

Prior to March 13, Stanley had denied Herf's request for vacation leave for March 13 and 14. Herf had called in sick on March 13 but, when Stanley called Herf's home, no one answered. Herf did not speak with Stanley on March 13 and did not call in on March 14.[6] On the Monday morning following these absences, March 17, Stanley heard rumors that Herf had left town over the weekend with his boat and camper. Stanley went to Herf's residence and spoke to a neighbor who told him that Herf had been out of town since the latter part of the previous week. From Herf's residence, Stanley saw Herf driving his camper with a boat in tow. Stanley reported what he had found to his supervisors, Donald Pipes and E. C. "Sid" Friar. On Tuesday, March 18, Stanley and Pipes spoke with an employee who lived near Herf's home, and who told them that Herf's camper and boat had not been in Herf's driveway since Thursday or Friday, March 13 or 14. Based on the above information, Stanley, Pipes, and Friar decided to meet with Herf, on his return to work on March 20, in order to obtain an explanation for what they believed to be a violation of company policy regarding vacation and sick leave.[7]

It is undisputed that Stanley called James Green, a zanjero and union steward, and requested that Green represent Herf at the meeting on March 20. Thereafter, Green, who was Herf's working partner, called Calvin "Wayne" McDowell, another zanjero and union steward, and asked McDowell if he would represent Herf at the upcoming meeting. McDowell agreed to do so. Herf heard from a fellow employee about the upcoming meeting and called Green. Green told Herf of his conversations with Stanley and McDowell and suggested that Herf contact McDowell so that the steward would be present at the meeting.

On the morning of March 20, Stanley telephoned Herf at his home and requested that he report to Respondent's office rather than his normal work area. Herf arrived at the office approximately one-half hour prior to his scheduled 3 p.m. worktime. Both McDowell and Green were present. It is undisputed that Herf met with Stanley, Pipes, and Frair without the assistance of a union steward. However, the facts, surrounding this meeting and at which McDowell was present are the subject of the instant dispute.

The General Counsel and the Charging Party contend that Respondent violated Section 8(a)(1) of the Act by denying Herf's request for union representation at the investigatory interview and by discharging Herf for his refusal to answer questions during the interview. Respondent, on the other hand, contends that Herf neither requested nor was denied union representation. Respondent further argues that, even if it committed a technical violation at the meeting without a union representative, it cured any such violation by holding a second meeting with Steward McDowell present. Further litigated at the hearing was the issue of the appropriateness of a make-whole remedy.

B. *Respondent's Interviews With Herf*

As discussed above, Respondent's management, Stanley, Pipes, and Friar, decided to meet with Herf on March 20 to obtain an explanation for the absences of March 13 and 14. According to Herf, upon arriving at Respondent's offices, he spoke with McDowell and Green. McDowell told Herf to ask for a union representative. About 15 minutes later, Stanley approached Herf and asked if he were ready to go into the meeting. Herf said that he did not start work until 3 p.m. and wanted to wait until that time. Stanley left but returned several minutes later and summoned Herf to Pipes' office. Herf asked Stanley whether there was a possibility of disciplinary action being taken against him. Stanley answered, "You got it." Herf then requested the presence of his union representative and Stanley replied, "He's not needed." According to Herf, he repeated his request for a union representative and Stanley again replied that one was not needed. Thereafter, Herf proceeded into Pipes' office with Stanley following behind.

According to Stanley, it was at the time that Herf stated his preference to wait until 3 p.m. for the meeting that a steward was first mentioned. Stanley testified that Herf asked, "what about a Steward?" and he replied, "Do you need one?" Stanley was interrupted by a telephone call. After the call, Stanley returned to Pipes' office at 3 p.m., and found Herf already inside the office with Pipes.

I resolve this conflict in the testimony in favor of Herf on the basis of corroboration by Green and McDowell. Green testified that he could not hear Herf's comments but that he twice heard Stanley say, "you don't need one," just prior to Herf's entrance into Pipes' office. McDowell[8] testified that he heard Herf ask if he "could

[4] A Spanish term meaning "ditch-rider" or "water-tender." Zanjeros perform duties essential to the transmission of water; i.e., opening and closing the irrigation canal gates and supplying information about the level and location of water.

[5] The graveyard shift is 11 p.m. to 7 a.m.

[6] Respondent contends that an employee must call in sick each day before the start of his shift and must speak directly with his supervisor based on the following language contained in the collective-bargaining agreement:

> To be credited with sick leave, an employee, regardless of the shift worked, must see that notification is given to their supervisor on or prior to the beginning of their regular shift on each day of their absence from work because of illness. Any deviation from this rule must be justified to the supervisor.

[7] The summary set forth above is for background purposes. I need not, and do not, make any findings regarding Herf's alleged violation of company rules.

[8] The General Counsel and the Charging Party contend that Stanley sought to induce McDowell to leave early on that afternoon so that no steward would be present at the time of Herf's interview. The record shows that Stanley advised employees, including Green and McDowell,

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have the union steward present" and that Stanley answered, "He is not needed." Accordingly, I find that Herf requested the presence of a union steward and that Stanley answered that one was not needed.

Herf testified that prior to any discussion Stanley locked the door to the office.[9] According to Herf, Frair commenced the meeting by advising Herf that the purpose of the meeting was to inquire about his justification for the absences of March 13 and 14. Frair then questioned Herf about his whereabouts on the 2 days in question. Frair also questioned Herf about his camper and boat. To each question Herf responded, "no comment." Herf testified that, after approximately 20 minutes of such questioning, he told the supervisors that the meeting was unlawful and he would make no further comments. Frair asked Herf to leave the office but told him not to leave the building. Herf then went into the room where McDowell was working and spoke with McDowell. Herf told McDowell what had taken place at the meeting. McDowell advised Herf to answer the questions if the employees were questioned again.

Stanley, Pipes, and Frair all testified consistently, for the most part, with Herf's version of the first meeting. The significant difference is that the three supervisors all testified that Herf gave no explanation for his refusal to make any comment. Under the circumstances, I find it more likely that, having had his request for the presence of a steward denied, Herf referenced that fact during the meeting. I therefore credit Herf's version of the first meeting.[10]

Stanley, Pipes, and Frair all testified that, after the first meeting with Herf, Frair called Donal Weesner, Respondent's assistant general manager, Joe Tittle, Respondent's manager of labor relations, and Charles Jones, Respondent's attorney. Frair asked Tittle for advice regarding possible discipline of Herf. Tittle advised Friar to bring Herf back into the office with a union steward. Tittle also suggested that Frair review with Herf the relevant portions of the contract which required justification of the absences. Although Tittle, Weesner, and Jones outlined possible disciplinary actions which might be taken against Herf, the ultimate decision as to what discipline, if any, should be granted was left to Stanley, Pipes, and Frair. Frair, Stanley, and Pipes decided to call Herf back to the meeting to question him again and to terminate Herf if he still refused to justify his absences. Prior to calling Herf back into the office, Stanley prepared a termination slip for Herf.

After a recess of approximately 15 minutes, Stanley asked Herf to come back into Pipes' office. Herf requested the presence of a steward. On his own initiative, McDowell walked into Pipes' office with Herf.[11]

According to Herf and McDowell, Stanley initiated the meeting by handing Herf two copies of his termination notice and by telling Herf that the reason for his discharge was written on the termination slip.[12] Herf handed one copy of the termination notice to McDowell. McDowell then asked Respondent's representatives what was going on. McDowell mentioned a recent incident involving another employee who had received only a 1-day suspension for an allegedly similar offense. Friar answered that the other employee's case had no bearing on Herf's case. Friar then began to ask Herf the same questions he had asked in the first meeting with Herf. Herf did not answer the questions but rather asked Stanley whether he had, in fact, been terminated. When Stanley replied affirmatively, Herf stated that, if he were already terminated, that was no reason for him to comment. Friar then read the contract provisions upon which Respondent was relying. McDowell and Pipes argued briefly over the past practice regarding requests for leave. Friar asked if McDowell had any questions and McDowell answered that he did not. The meeting was then ended with Herf making a derogatory remark towards Stanley.

The significant conflict in the testimony regards not the subject matter of the meeting but, rather, the order in which the events occurred. According to Pipes, Friar, and Stanley, at the outset of the meeting, Friar instructed Stanley to bring McDowell up to date with regard to the first meeting. Stanley repeated for McDowell the reasons why Herf's absences were suspicious and told McDowell that Herf had refused to answer any questions at the first meeting. Friar then proceeded to ask Herf the same series of questions that he had asked at the first meeting. Herf simply answered, "No comment." Friar then read the contract provisions which he claimed required Herf to justify his absences. There was no response from Herf and Stanley then stated that Herf had left Respondent with no alternative but to terminate his employment. Stanley picked up the termination slip, signed it, and passed it over to Pipes for his initials.

I have decided to credit the testimony of McDowell regarding this meeting. McDowell has less of a personal interest in this case than the other witnesses. Further, if at the outset of the meeting Stanley had told McDowell of Herf's refusal to answer questions at the first meeting, it would be unlikely for McDowell to remain silent, particularly where he had previously told Herf to answer the questions if they were asked again. Moreover, I was not convinced by Respondent's explanation for having filled out the termination slip prior to the meeting. I credit Herf's version of these events as his testimony is substantially corroborated by McDowell.[13]

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that their paychecks were late and suggested that the employees "go have a beer." The paychecks were, in fact, late. I do not infer from these facts that Stanley was engaged in a devious scheme to deprive Herf of union representation.

[9] McDowell corroborated this fact.

[10] In crediting Herf's testimony regarding this point, I have considered that his testimony is contradicted by three witnesses. However, credibility determinations are not based on numbers, but rather upon the demeanor of witnesses, with due regard for the logic of probability.

[11] Stanley testified that he responded affirmatively to Herf's request to have McDowell present.

[12] Stanley had written on the termination slip "A.W.O.L. failure to justify your absences for March 14 & 15 1980." The March 14 and 15 dates refer to the dates the shifts ended.

[13] I have considered Respondent's argument that the three supervisors were advised to give Herf another chance to answer the questions with a steward present. However, I am constrained to find that Stanley handed Herf the termination slip prior to the questioning of Herf. If Herf had followed McDowell's advice and the supervisors had followed Tittle's advice, this case would not have arisen.

C. *Analysis and Conclusions*

1. The interview and discharge

In *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975), the United States Supreme Court upheld the Board's determination that under Section 7 of the Act an employee has the right to insist upon the presence of a union representative at an interview which the employee reasonably believes might result in disciplinary action.

As found above, Stanley had requested that Herf report to Respondent's office rather than his work station. Herf had earlier learned from his steward that Respondent wanted to discuss Herf's absences of March 13 and 14. Thus, there can be no doubt that Herf had reasonable cause to believe that disciplinary action was being considered. Under these circumstances, Respondent violated Herf's rights under *Weingarten* by interviewing Herf after Stanley had denied the employee's request for a union representative.

Respondent argues that, even if it engaged in a technical violation of *Weingarten* at the first meeting, it "cured" the violation by holding a second meeting at which McDowell was present. However, I find no factual basis for such an argument. As found above, at the outset of the second meeting, prior to any questioning of Herf, Stanley handed the employee his termination slip. This termination slip indicated as the reason for discharge: "A.W.O.L. failure to justify your absences." The "failure to justify [his] absence" could only refer to the first meeting held that date as that was the only occasion when Herf was asked to justify or explain his absences. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by conducting an interview with Herf after having denied his request for union representation and further violated Section 8(a)(1) by discharging Herf for his failure to answer questions at said interview.

2. The make-whole remedy

In *Kraft Foods, Inc.*, 251 NLRB 598 (1980), the Board announced the following test for determining whether a make-whole remedy[14] is warranted in cases involving violation of an employee's rights under *Weingarten*. First, the General Counsel can establish a *prima facie* case by proving that an employer conducted an investigatory interview in violation of *Weingarten* and that the employee make-whole rights were violated was subsequently disciplined for the conduct which was the subject of the unlawful interview. Here, as shown above, the General Counsel has established that Respondent conducted an unlawful interview with Herf and subsequently discharged Herf, at least in part, for his refusal to answer questions at that unlawful interview.

In the face of such a showing, the burden shifts to Respondent to prove that its decision to discipline Herf was not based on information obtained at the unlawful interview. When questioned as to the reason for Herf's discharge, Stanley adopted his prior testimony at an unemployment compensation hearing that Herf was *not* terminated for his absences but "was fired for the simple reason that he refused to answer questions and justify the absences at a meeting that was held on March 20th." Consistent therewith is the testimony of all three supervisors, Stanley, Pipes, and Friar, that they had no intention of discharging Herf prior to the meeting of March 20. However, 15 minutes after the unlawful meeting, Herf was terminated for the failure to justify his absences. Under such circumstances, Respondent has failed to substain its burden of proving that Herf's discharge was not based on information obtained at the unlawful interview. Accordingly, I find that Herf is entitled to a make-whole remedy.

[14] Such as reinstatement, backpay, and expungement of all disciplinary records.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by denying the request of employee Tom Herf to have union representation at an investigatory interview which he reasonably believed might result in disciplinary action against him, and by discharging Herf based upon his refusal to answer questions at said unlawful interview.

4. The unfair labor practices found above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent discharged its employee Tom Herf in violation of Section 8(a)(1) of the Act, I shall order Respondent to offer Herf immediate and full reinstatement to his former position of employment or, if that position is no longer available, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges,[15] and to make him whole for any loss of pay he may have suffered by reason of Respondent's discrimination against him, with interest thereon, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Olympic Medical Corporation*, 250 NLRB 146 (1980). See also *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Further, having found that Respondent discharged Herf based on an unlawful interview, I shall recommend that Respondent be ordered to expunge or physically remove from its records any termination notices and any reference thereto relating to the discharge of Herf on March 20, 1980.

[15] Nevertheless, if Herf does accept reinstatement, Respondent is not foreclosed from lawfully requiring justification from Herf for the absences of March 13 and 14. See *Illinois Bell Telephone Company*, 251 NLRB 932 (1980).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[16]

The Respondent, Salt River Valley Water Users' Association, Phoenix, Arizona, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Denying the request of union representation to employees at investigatory interviews when the employees have reasonable grounds to believe that the matters to be discussed might result in their being the subject of disciplinary action.

(b) Discharging any employee on the basis of information obtained at an investigatory interview where it has denied the employee's request to have union representation at said interview.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Offer Tom Herf immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(b) Make whole Herf for any loss of earnings he may have suffered by reason of Respondent's discrimination against him, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Expunge and physically remove from its records any termination notices and any reference thereto relating to the discharge of Herf on March 20, 1980.

(d) Preserve and, upon request, make available to agents of the Board, for examining and copying, the payroll records, social security records, timecards, personnel records, and all other records necessary to analyze the amount of money due under the terms of this Order.

(e) Post at its Phoenix, Arizona, facility copies of the attached notice marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[16] All outstanding motions inconsistent with this recommended Order hereby are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[17] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."